

FAIR WORK COMMISSION

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 Yearly Review of Modern Awards – Seagoing Industry Award 2010 –

Alleged NES inconsistencies

(AM2014/243)

SUBMISSIONS OF THE MARITIME UNION OF AUSTRALIA

Introduction

1. On 2 March 2015 the Fair Work Ombudsmen (**FWO**) identified a concern in relation to clauses 18.2 and 27 of the Seagoing Industry Award 2010 (**Seagoing Award**) in the following terms:

The FWO has received enquiries regarding the interaction of clauses 18.2 and 27 of this award (which both provide for certain categories of employees to work greater than 38 ordinary hours of work per week) and the maximum ordinary hours provision of the National Employment Standards. (Item 34)

2. On 16 January 2017 the Full Bench confirmed that it would receive submissions from the award participants as to whether clauses 18.2 and 27 are inconsistent with the National Employment Standards (**NES**).

Legislative provisions

3. The NES addresses the maximum number of weekly hours in sections 62 - 64 of the *Fair Work Act 2009* (**FW Act**). Relevantly the NES provides:

62 Maximum weekly hours

Maximum weekly hours of work

- (1) An employer must not request or require an employee to work more than the following number of hours in a week unless the additional hours are reasonable:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and

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Date: 13 February 2017

- (ii) the employee's ordinary hours of work in a week.

...

63 Modern awards and enterprise agreements may provide for averaging of hours of work

- (1) A modern award or enterprise agreement may include terms providing for the averaging of hours of work over a specified period. The average weekly hours over the period must not exceed:
 - (a) for a full-time employee—38 hours; or
 - (b) for an employee who is not a full-time employee—the lesser of:
 - (i) 38 hours; and
 - (ii) the employee's ordinary hours of work in a week.
- (2) The terms of a modern award or enterprise agreement may provide for average weekly hours that exceed the hours referred to in paragraph (1)(a) or (b) if the excess hours are reasonable for the purposes of subsection 62(1).

Note: Hours in excess of the hours referred to in paragraph (1)(a) or (b) that are worked in a week in accordance with averaging terms in a modern award or enterprise agreement (whether the terms comply with subsection (1) or (2)) will be treated as additional hours for the purposes of section 62. The averaging terms will be relevant in determining whether the additional hours are reasonable (see paragraph 62(3)(i)).

Clause 18.2

- 4. Clause 18.2 of the Seagoing Award applies to employees who do not work on a vessel granted a temporary licence under the *Coastal Trading (Revitalising Australia Shipping) Act 2012*. It is in the following terms:

18.2 The ordinary hours for operational and maintenance work will be eight hours per day each day of the week. Subject to meeting the requirements of the vessel, employees may be required to work in excess of the ordinary hours.

- 5. Mathematically clause 18.2 provides that the ordinary hours of work are 56 hours a week, an amount in excess of the 38 stipulated in the NES.
- 6. Clause 20 of the Seagoing Award, however, provides for a leave factor whereby an employee "for each day of duty on a vessel or a day during which the employee is necessarily involved in travelling to or from a vessel or place of work as required by the employer, an employee will accrue an entitlement to 0.926 of a day's leave without loss of pay." (clause 20.1(a)) In other words an employee works 27 weeks each year and has leave without loss of pay for the remaining 25 weeks.

7. The maximum ordinary hours an employee can work over a year is 1,512 hours. (56 ordinary hours per week for 27 weeks)
8. When these hours are averaged over the year, the average ordinary hours is 29.08 per week.
9. Furthermore employees to whom clause 18.2 applies can only be employed on a full time or relief basis. (clause 10.1) A relief employee is entitled to the leave factor.
10. Clause 18.2 is not inconsistent with the NES.

Clause 27

11. Clause 27 of the Seagoing Award applies to employees working on a vessel granted a temporary licence under the *Coastal Trading (Revitalising Australia Shipping) Act 2012*. It is in the following terms:
 - 27.1 The ordinary provides the ordinary hours work will be eight hours per day from Monday to Friday.
 - 27.2 All hours worked in excess of eight hours per day from Monday to Friday will be paid as overtime.
 - 27.3 All hours worked on Saturdays, Sundays and public holidays will be paid for as overtime.
12. Mathematically clause 27 provides that the ordinary hours of work are 40 hours a week, an amount in excess of the 38 stipulated in the NES.
13. Clause 30 of the Seagoing Award, however, provides:

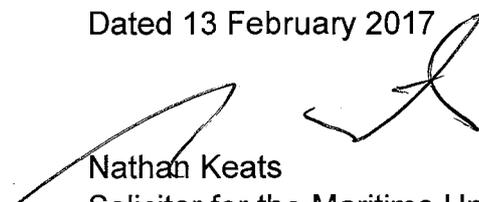
Notwithstanding the NES, each employee will be entitled to payment of leave of eight days for each completed month of service and pro rata for any shorter period.
14. By their very nature employees to whom clause 27 applies are only within the within the jurisdiction of the FW Act, and therefor covered by the Seagoing Award, for short periods of time. It follows that it is not possible to average the ordinary hours of an employee over 52 weeks. Indeed there is no satisfactory period of which hours could be averaged.
15. It follows that the FWC must consider the clause on the basis that there is no provision averaging the hours of work. On its face the clause is inconsistent with the NES.
16. The MUA suggests this problem is remedied by amending clause as marked below:

- 27.1** The ordinary provides the ordinary hours work will be eight 7.6 hours per day from Monday to Friday.
- 27.2** All hours worked in excess of eight 7.6 hours per day from Monday to Friday will be paid as overtime.
- 27.3** All hours worked on Saturdays, Sundays and public holidays will be paid for as overtime.

Conclusion

17. The FWC should find that clause 18.2 is not inconsistent with the NES.
18. The FWC should find that clause 27 is inconsistent with the NES and amend the clause as proposed in paragraph 16 above.

Dated 13 February 2017



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